Supreme Court, U.S.
FILED

08-91 JUL 17 2008

OFFICE OF THE CLERK
William K. Suter, Clerk

No. ____

In The
Supreme Court of the United States

ELIZABETH STAUBER

and

JACK and TIMOTHY McGRATH,
Petitioners,

v.

JAMES McGRATH,
Respondent.

On Petition for Writ of Certiorari to the Fifth District Court of Appeals of Ohio

PETITION FOR WRIT OF CERTIORARI

VORYS, SATER, SEYMOUR AND PEASE LLP, BY

John J. Kulewicz
Counsel of Record
William G. Porter, II
Michael J. Hendershot
52 East Gay Street
P.O. Box 1008
Columbus, OH 43216-1008
(614) 464-5634

Counsel for Petitioners

July 17, 2008

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Whether a state court contravenes the Full Faith and Credit Clause by declining to enforce another state's judgment on the basis that the foreign judgment conflicts with a prior judgment of the forum state.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED .. 1

STATEMENT OF THE CASE 2

REASONS WHY THE PETITION SHOULD BE GRANTED 7

I. The Full Faith and Credit Clause requires recognition of a sister-state judgment that intervenes between judgments of the forum state. 7

CONCLUSION 14

APPENDIX

Appendix A: Ohio Court of Appeals Decision (November 19, 2007) 1a

Appendix B: Ohio Court of Common Pleas Judgment Entry (November 9, 2006) 16a

Appendix C: Supreme Court of Ohio Entry (April 23, 2008) 20a

TABLE OF AUTHORITIES

Cases

Baker v. Gen. Motors Corp.,
522 U.S. 222 (1998) 12, 13

Franchise Tax Bd. v. Hyatt,
538 U.S. 488 (2003) 12

Jensen v. Barnes,
33 Colo. App. 333, 519 P.2d 1223 (1974) 8

Klumpner v. Klumpner,
182 Ill. App. 3d 22, 537 N.E.2d 914 (1989) 8

Medveskas v. Karparis,
161 Vt. 387, 640 A.2d 543 (1994) 8, 11

Milwaukee Cty. v. M.E. White Co.,
296 U.S. 268 (1935) 11

Morris v. Jones,
329 U.S. 545 (1947) 10, 11

Parsons Steel, Inc. v. First Alabama Bank,
474 U.S. 518 (1986) 11, 12

Smith v. Smith,
606 So. 2d 164 (Ala. App. 1992) 8

Stuart v. Livles,
210 Cal. App. 3d 1215 (1989) 8

Sutton v. Leib,
342 U.S. 402 (1952) 10, 11

Treinies v. Sunshine Mining Co.,
308 U.S. 66 (1939) 7

Constitutional and Statutory Provisions

28 U.S.C. § 1257(a) 1

U.S. Const. art. IV, § 1 ..... *passim*

Rules

Ohio Rule of Civil Procedure 60(B) 4

Other Authorities

50 C.J.S. *Judgments* § 973 (2008) 7, 10

Ginsburg, Ruth B., *Judgments in Search of Full Faith and Credit: The Last-in-Time Rule for Conflicting Judgments*, 82 Harv. L. Rev. 798 (1969) 7, 8, 11

Leflar, Robert A., American Conflicts Law § 81 (3d ed. 1977) 13

McDougal, Luther L., III, et al., American Conflicts Law, § 69 (5th ed. 2001) 13

Reynolds, William, *The Iron Law of Full Faith and Credit*, 53 Md. L. Rev. 412 (1994) 12

Witkin, B.E., et al., Witkin California Procedure § 311 (4th ed. 1997 & Supp. 2007) 10

PETITION FOR A WRIT OF CERTIORARI

Elizabeth Stauber and Jack and Timothy McGrath pray that the Supreme Court grant a writ of certiorari to review the judgment of Ohio's Fifth District Court of Appeals.

OPINIONS BELOW

The decision of the Fifth District Court of Appeals is unreported and is set forth at Appendix A, pp. 1a-15a. The decision of the Fairfield County Common Pleas Court is unreported and is set forth at Appendix B, pp 16a-19a. The 4-3 decision of the Supreme Court of Ohio denying discretionary review is reported at 117 Ohio St.3d 1477, 884 N.E.2d 1109 (2008) (Table), and is set forth at Appendix C, p. 20a.

JURISDICTION

The Supreme Court of Ohio denied discretionary review on April 23, 2008. [Pet. App. C]. This Petition is timely because it has been filed within 90 days of that date. The Fifth District Court of Appeals decision was issued on November 19, 2007. [Pet. App. A]. This Court has jurisdiction to review the Fifth District's decision by writ of certiorari pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

This case involves an interpretation of the Full Faith and Credit Clause of the United States Constitution, Article IV, Section 1, which reads: "Full Faith and Credit shall be given in each State to the

public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof."

STATEMENT OF THE CASE

This Full Faith and Credit Clause case involves a sister-state judgment that has intervened between judgments of the forum state. In each state, the principal question was whether respondent James McGrath was the father of petitioners Jack and Timothy McGrath, and therefore owed them support. The controversy originated and developed into an initial judgment in Ohio, moved to California and resulted in entry of a conflicting judgment, then returned to Ohio, which declined to recognize the California outcome.

As the matter stands without this Court's review, California treats James McGrath as the father, but Ohio treats him as a stranger to Jack and Timothy. The boys are eight-year-old twins who were born to Elizabeth Stauber. James McGrath's status as the father is especially important because each boy has a serious health condition and James's status affects whether the twins can access reasonably priced health insurance.

The twins' effort to establish that James McGrath is their father began in an Ohio courtroom after he revoked an acknowledgment of paternity one day before the acknowledgment became irrevocable. By the time the Ohio trial court ordered DNA testing for

Elizabeth and the twins, the three had moved to California to start a life without James McGrath.

Based on Elizabeth's unwillingness to submit herself or her sons to DNA testing, the Ohio trial court ruled that James McGrath was not the twins' father. An appeal, remand, and second appeal resulted in the same outcome—a final order declaring that James McGrath is not the father of Jack and Timothy.

In California, Elizabeth initiated a support action against James McGrath. Following a hearing at which James McGrath specially appeared to contest personal jurisdiction, the Los Angeles County Superior Court found that the Ohio proceedings had lacked suitable due process protections for the twins, and adjudicated James McGrath the father of Jack and Timothy. Over a period of months, the Superior Court issued a series of support judgments against him.

Back in Ohio, Elizabeth hired an attorney to enforce the California judgments in both Fairfield County and Franklin County. She also initiated a separate suit to establish the paternity of Jack and Timothy. The Franklin County Common Pleas Court domesticated the judgments, but the Fairfield County Court of Common Pleas did not. Because James McGrath apparently has no property in Franklin County, the Fairfield County litigation became the focus of the effort of Elizabeth and the twins to enforce the California judgments in Ohio.

At each step of this subsequent litigation, Elizabeth and the twins pointed to the Full Faith and Credit

Clause as mandating that Ohio's courts recognize the California judgments.

In response to the efforts to domesticate the four California judgments, James McGrath filed a motion to consolidate the actions, and argued that California's view of the Full Faith and Credit Clause meant that the Ohio trial court had no full-faith-and-credit obligation towards the California judgments. He argued that, because the California court "failed to honor a legitimate final appellate order" of an Ohio court "in violation of the full faith and credit provisions" of the Constitution, the Ohio court could not now honor the intervening California judgment without "void[ing] the prior Ohio judgment."

Elizabeth and the twins responded that the California orders were due full faith and credit in Ohio, arguing that the California judgments were "valid orders entered by a sister state that must be given full faith and credit."

When James McGrath later moved for relief from the California judgments under Ohio Rule of Civil Procedure 60(B), he pointed to California's purported defiance of the Full Faith and Credit Clause as a reason the Ohio court should give him Rule 60(B) relief. His motion claimed that the initial Ohio judgments were "res judicata and entitled to full faith and credit" in the second Ohio litigation.

Elizabeth and the twins responded that the clause compelled Ohio to recognize the California judgments. "The California judgments should be given full faith

and credit here in Ohio [because the California proceedings complied with due process requirements.]"

The Ohio trial court ruled in favor of James McGrath, on the premise that the original Ohio finding of no paternity "was entitled to full faith and credit" and that the California judgments were therefore "void." [Pet. Appx. at 18a]. Based on that reasoning, the trial court vacated the California judgments filed for domestication in Ohio.

Elizabeth and the twins appealed to Ohio's Fifth District Court of Appeals. Their first assignment of error challenged the trial court's full-faith-and-credit ruling: "The trial court erred in granting Defendant McGrath's motion for relief from the California judgment because the California judgments were entitled to full faith and credit." More specifically, they argued that the trial court's decision declaring the California judgments void failed to accord the California judgments the credit that Article IV, Section 1, demands. "[T]he trial court below . . . held inapplicable a decision of California—a decision entitled to full faith and credit in the courts of Ohio unless made in violation of due process . . . ."

Assessing these arguments, the Ohio appellate court first recognized that this case presents a three-step full-faith-and-credit problem. The two-judge majority opined that the trial judge in the second Ohio action "could not enforce any order contrary to" the first Ohio judgment. [Pet. App. at 12a]. Therefore, the majority did "not agree" that the California judgments were entitled to full faith and credit. [*Id.* at 13a].

The dissenting judge also noticed the three-forum full-faith-and-credit puzzle posed by the appeal. The dissenter properly analyzed the appeal in terms of whether James McGrath had raised his own full-faith-and-credit challenge on appeal in California. "[James McGrath] chose not to contest, via appeal, the validity of the California Court's decision not to afford the Ohio Court's decree full faith and credit, despite having appeared and defended in California on the minors' complaint there." [*Id.* at 14a (Hoffman, J., dissenting)]. The dissenting judge (echoing this Court's guidance on the subject) concluded that James McGrath was "asserting his argument in the wrong forum" because "[h]e should have made the argument via appeal in California." [*Id.*].

Elizabeth and the twins sought discretionary review in the Supreme Court of Ohio. With three Justices voting to review the case (four votes are needed to secure review), the court declined review over the federal constitutional question of what credit is due a second-in-time judgment in a forum when that forum issued the first-in-time judgment.

Elizabeth and the twins now seek review in this Court because Ohio's Fifth District wavered from the constitutional command that it give full credit to the subsequent California judgments even though those judgments conflicted with an earlier Ohio judgment.

REASONS WHY THE PETITION SHOULD BE GRANTED

I. The Full Faith and Credit Clause requires recognition of a sister-state judgment that intervenes between judgments of the forum state.

The three-step conflict-of-judgments problem posed to the Ohio appellate court is nothing new and, outside of the subset of cases where the first and third forum are the same, there is general agreement nationwide that the second-in-time judgment is due full faith and credit in the third forum. *See, e.g., Treinies v. Sunshine Mining Co.*, 308 U.S. 66 (1939); 50 C.J.S. *Judgments* § 973 (2008).

But states have long resisted the last-in-time rule when it is their own judgment that loses out to the second judgment. As then-professor Ginsburg wrote in 1969, "Resistance to the [Supreme] Court's last-in-time rule has been considerable. It occurs most frequently where recognition of the second judgment is requested in the state which rendered the first judgment." *See* Ruth B. Ginsburg, *Judgments in Search of Full Faith and Credit: The Last-in-Time Rule for Conflicting Judgments*, 82 Harv. L. Rev. 798, 800 (1969).

Justice Ginsburg predicted that state resistance to this Court's last-in-time holdings would "continue to generate occasional unfortunate conflicts between state courts until it is definitively resolved by paramount federal authority," and—therefore—that the time was "ripe for a further statement" from this Court, even in 1969. *Id.*

At the time of the 1969 article, Justice Ginsburg noted state supreme court decisions from Arizona, Nevada, Washington, and Virginia that endorsed an exception to the last-in-time rule when the first-in-time decision issued from a court in their state. *Id.*, at 800 n.12.

Since that writing, at least five other state appellate decisions have likewise departed from the Full Faith and Credit Clause by refusing to follow the last-in-time rule when the initial decision issued from that state's judiciary. *See Medveskas v. Karparis*, 161 Vt. 387, 395, 640 A.2d 543, 547 (1994) (rejecting effort to enforce Massachusetts custody and support judgment "because the Massachusetts order denied full faith and credit to the [earlier] Vermont order"); *Smith v. Smith*, 606 So. 2d 164, 165 (Ala. App. 1992) ("Alabama courts are not required by the full faith and credit clause to give recognition to a judgment of a sister state which judgment is in direct conflict with an earlier, non-modifiable, final, valid, Alabama judgment . . . ."); *Stuart v. Livles*, 210 Cal. App. 3d 1215, 1221 (1989) ("the full faith and credit clause does not require the California courts to ignore a [prior] California judgment" in light of an intervening Colorado judgment) (reversing lower court); *Klumpner v. Klumpner*, 182 Ill. App. 3d 22, 32, 537 N.E.2d 914, 921 (1989) ("notwithstanding the general rule that where inconsistent judgments exist, the full faith and credit clause requires the latest judgment to be controlling in a third action between the parties . . . we believe that [the rule is inapplicable] where child custody and visitation rights are involved") (reversing lower court); *Jensen v. Barnes*, 33 Colo. App. 333, 336, 519 P.2d 1223, 1224 (1974) ("The general rule is that

when courts of different jurisdictions have reached different results on the same issue, the later judgment controls. . . . However, it is also the rule that when one of the conflicting decisions was entered by a court of the state in which the current action is pending, that decision takes precedence over the court of a sister state.").

The decision from Ohio adds another state to the roster of "unfortunate conflicts" between sister states. And the Ohio decision has the further unfortunate consequence of telling the twins that James McGrath is not their father and threatening their access to needed health insurance.

The Ohio court described its holding in words that echo Justice Ginsburg's description of problem cases. "As stated, . . . there is a final judgment entered by a court of competent jurisdiction, affirmed by this court, and not appealed to the Ohio Supreme Court, entered prior to the California order. The trial court could not enforce any order contrary to this Ohio judgment." *Stauber v. McGrath* [Pet. App. at 12a]. The court reiterated this point: "The California judgment is simply not enforceable in Ohio." [Pet. App. at 13a].

Resistance to the full-faith-and-credit command that a state must enforce a sister state's judgment even when circumstances compelled the sister state to withhold full faith and credit from the initial judgment has now percolated into the secondary authorities. For example, the most recent version of the Witkin treatise for California law acknowledges the "general rule" that "makes the later judgment conclusive in a third action," but states that a "different rule applies where

one of the conflicting judgments was entered by the court in which the current action is pending . . . ." 7 B.E. Witkin, et al., Witkin California Procedure § 311 (4th ed. 1997 & Supp. 2007). Likewise, the Corpus Juris Secundum entry for conflicting judgments adopts the rogue rule that Justice Ginsburg criticized in 1969: "the full faith and credit clause of the federal Constitution does not require a state to give recognition to a judgment of a sister state in opposition to an earlier judgment of its own courts." 50 C.J.S. Judgments, § 973 (2008).

The growing acceptance of this interpretation of the Full Faith and Credit Clause strikes at the heart of our constitutional unity. If full faith and credit is no more than a suggestion of comity, the unifying purpose of the rule is lost. The Constitution welds the states into one entity for purposes of cross-border judgments. State courts that refuse full faith and credit to a sister state's judgment weaken the bond among the states.

Decisions such as the Ohio judgment also rest uneasily in the shadow of this Court's statements in *Morris v. Jones*, 329 U.S. 545 (1947), and *Sutton v. Leib*, 342 U.S. 402 (1952). *See* 329 U.S. at 552 ("As to respondent's contention that the Illinois decree, of which petitioner had notice, should have been given full faith and credit by the Missouri court, only a word need be said. . . . [T]he place to raise that defense was in the Missouri proceedings."); 342 U.S. at 407 (observing that a New York annulment of a Nevada marriage is "entitled to full faith," even in Nevada).

This Court's statements in *Morris* and *Sutton* should guide all courts to recognize a last-in-time

judgment even when the first judgment issued from the court that is asked to recognize the later judgment. But, as Justice Ginsburg explained in 1969, an "assiduous" parsing of dictum and holding leaves a narrow passage for state courts to follow a rule of "we owe no credit to a state that did not credit our earlier judgment." *See* Ginsburg, *Judgments in Search*, at 810-11 (describing the statement in *Sutton* as dictum and noting that the first judgment was never raised as a defense in the second action in *Morris*). Indeed, the Vermont Supreme Court explicitly noted what it viewed as a hole in this Court's full-faith-and-credit jurisprudence when it refused to enforce a sister-state judgment that conflicted with an earlier Vermont judgment. *See Medveskas*, 161 Vt. 387, 394, 640 A.2d 543, 546 (1994) (noting that this Court has never addressed the last-in-time rule where the first forum refuses to enforce a second forum's judgment conflicting with an earlier judgment of the first forum, where the first judgment was raised as a defense in the second forum).

Beset by their interstate dilemma arising from such misinterpretations, Petitioners urge this Court to clarify the transformative power the founders embedded in the Full Faith and Credit Clause to meld the several states into a "single nation." *Milwaukee Cty. v. M.E. White Co.*, 296 U.S. 268, 277 (1935).

Decisions since *Milwaukee County, Morris,* and *Sutton* have further strengthened the implication of those cases—that a forum state must give full credit to a subsequent decision of another state, even if it conflicts with the forum state's initial judgment. *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S.

518 (1986), although applying the Full Faith and Credit Act to a federal judgment, illustrates the point. When faced with a federal court order that disregarded an intervening state judgment that itself conflicted with an earlier federal judgment, this Court held that any challenge to the state court's treatment of the first federal judgment "must be pursued by way of an appeal through the state-court system and certiorari from this Court." *Id.* at 525. More recently, this Court has labeled the full faith and credit obligation as to judgments "exacting." *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998); *see also Franchise Tax Bd. v. Hyatt*, 538 U.S. 488, 494 (2003) (restating the "exacting" principle of *Baker*).

Legal commentary also emphasizes the unyielding command of the Full Faith and Credit Clause, even when a state is asked to recognize a judgment that conflicts with its own earlier judgment. One commentator has described the full-faith-and-credit obligation as an "iron law," and noted that state-court recalcitrance is most pronounced when the first and third fora are the same. *See* William Reynolds, *The Iron Law of Full Faith and Credit*, 53 Md. L. Rev. 412, 412, 417 (1994). Another commentator—in an earlier edition of his treatise—states the general last-in-time rule without exception for the identity of the first forum. "When two contradictory judgments are rendered between the same parties on the same issues . . . [t]he remedy is appeal from the second judgment, not collateral attack upon it. . . . If the second court itself has jurisdiction and decides that the first court did not have jurisdiction, this decision *even though erroneous* is conclusive unless reversed on appeal. If the case subsequently comes up in a third state, or in

the *state that rendered the first judgment*, it is the second judgment that is binding." Robert A. Leflar, American Conflicts Law § 81 (3d ed. 1977) (emphasis added).[1]

There is no "roving public policy exception to the full faith and credit due judgments." *Baker*, 522 U.S. at 233 (quotation marks and emphasis deleted). Nor is there a roving exception to the credit due a last-in-time judgment when the first and third fora are the same. The unifying intent of Article IV, Section 1, is the same whether a third state or the first state is asked to recognize a second state's judgment that conflicts with a first state's initial judgment. Some state courts have failed to heed the federalizing command of the Full Faith and Credit Clause in this context in the absence of a definitive holding from this Court addressing the conflict-of-judgments question raised in this petition. The issue has been ripe since at least 1969 and awaits this Court's attention.

---

[1] The most recent edition of the Leflar treatise softens its criticism of those states that disregard the last-in-time rule when asked to enforce a judgment contrary to an earlier judgment from their own state, but does cite as "persuasive[]" Justice Ginsburg's argument that the last-in-time rule should control even these situations. Luther L. McDougal, III, et al., American Conflicts Law, § 69 & n.9 (5th ed. 2001).

CONCLUSION

The petition for a writ of certiorari should be granted.

July 17, 2008

Respectfully Submitted,

VORYS, SATER, SEYMOUR AND PEASE LLP, BY

John J. Kulewicz
Counsel of Record
William G. Porter, II
Michael J. Hendershot
52 East Gay Street
P.O. Box 1008
Columbus, OH 43216-1008
(614) 464-5634

Counsel for Petitioners

APPENDIX

APPENDIX A

COURT OF APPEALS OF OHIO
FIFTH DISTRICT, FAIRFIELD COUNTY

Nos. 2006-CA-71, 2006-CA-72

[Filed November 19, 2007]

Elizabeth Stauber and [J.M] and [T.M.] Minor Children, by and Through their Mother and Next Best Friend Elizabeth Stauber,	)
Plaintiffs-Appellants	)
v.	)
James S. McGrath,	)
Defendant-Appellee.	)

Civil appeals from the Fairfield County Court of Common Pleas, Case No. 06-PA-00111 & 06 DR 00668.

GWIN, P.J.

{¶ 1} These are two appeals consolidated for purposes of this opinion. In appeal 06 CA 72, [J.M.] and [T.M.], minors, by their mother and next friend Elizabeth Stauber, appeal the judgment of the Court

of Common Pleas of Fairfield County in Case Number 06 PA 111. In this case the court dismissed the children's complaint to find appellee James McGrath is their father. Appellants assign four errors to the trial court:

{¶ 2} "I. THE TRIAL COURT ERRED IN RULING THAT A JUDGMENT ALLOWING THE DEFENDANT-APPELLEE JAMES MCGRATH TO RESCIND HIS ACKNOWLEDGEMENT OF PATERNITY WAS RES JUDICATA, THEREBY DISMISSING A SUBSEQUENT ACTION FOR PARENTAGE AGAINST MCGRATH BROUGHT BY THE PLAINTIFF-APPELLANT MINOR CHILDREN.

{¶ 3} "II. THE TRIAL COURT ERRED IN ITS APPLICATION OF RES JUDICATA TO THE PREJUDICE OF THE PLAINTIFF-APPELLANT MINOR CHILDREN, AND MUST BE REVERSED UNDER THE PLAIN-ERROR DOCTRINE TO PREVENT A MANIFEST MISCARRIAGE OF JUSTICE AGAINST THE MINOR CHILDREN.

{¶ 4} "III. THE TRIAL COURT ERRED IN FINDING THAT THE PLAINTIFF-APPELLANT'S MINOR CHILDREN HAVE ENGAGED IN VEXATIOUS LITIGATION AS CONTEMPLATED BY R.C. 2323.51, AND GRANTING DEFENDANT-APPELLEE MCGRATH'S MOTION FOR ATTORNEY'S FEES AND EXPENSES.

{¶ 5} "IV. THE TRIAL COURT ERRED IN GRANTING DEFENDANT-APPELLEE'S OBJECTION AND MOTION TO STRIKE FROM THE RECORD DNA TEST RESULTS FROM PLAINTIFFS' MOTION TO PRESERVE DNA SAMPLES AND TEST RESULTS."

{¶ 6} In appeal 06 CA 71, Elizabeth Stauber, [J.M.] and [T.M.] appeal the judgment of the Court of Common Pleas, Domestic Relations Division in Case Number 06 DR 668.In this case, the court sustained appellee James McGrath's motion for relief from judgment brought pursuant to Civ.R. 60(B), and refused to enforce appellants' foreign judgment from the State of California, which established paternity and ordered support. Appellants assign three errors in this appeal:

{¶ 7} "I. THE TRIAL COURT ERRED IN GRANTING DEFENDANT MCGRATH'S MOTION FOR RELIEF FROM THE CALIFORNIA JUDGMENTS BECAUSE THE CALIFORNIA JUDGMENTS WERE ENTITLED TO FULL FAITH AND CREDIT.

{¶ 8} "II. THE TRIAL COURT ERRED IN GRANTING DEFENDANT MCGRATH'S MOTION FOR RELIEF FROM THE CALIFORNIA JUDGMENTS BECAUSE IT EFFECTIVELY 'REVERSED' A CALIFORNIA DECISION WHICH MCGRATH FAILED TO APPEAL IN CALIFORNIA.

{¶ 9} "III. THE TRIAL COURT ERRED IN GRANTING DEFENDANT MCGRATH'S

MOTION FOR RELIEF FROM THE CALIFORNIA JUDGMENTS BECAUSE IT IS NOT UNJUST FOR MCGRATH TO COMPLY WITH THOSE JUDGMENTS."

{¶ 10} On [redacted], 2000, Elizabeth Stauber gave birth to twin sons, [J.M.] and [T.M.]. On June 26, 2000, James McGrath executed an Acknowledgment of Paternity Affidavit with the Ohio Department of Human Services.

{¶ 11} On March 6, 2001, Stauber and McGrath signed an Agreed Entry with the Fairfield County Court of Common Pleas, allocating parental rights and responsibilities between them and agreeing to undergo genetic testing to establish the father-child relationship between McGrath and the twins. The agreement acknowledged Stauber and the twins would be moving to California. Stauber did not submit herself or the twins for the genetic testing, and she moved with the children to California. The children have never been back to Ohio.

{¶ 12} On June 25, 2001, James McGrath filed a complaint in Fairfield County for rescission of the acknowledgement of paternity. On August 27, 2002, the trial court ordered Stauber to submit herself to genetic testing within thirty days or an order would be issued stating James McGrath was not the father of the twins. A Nunc Pro Tunc Entry was filed on August 28, 2002 to include the twins for genetic testing. Stauber did not submit herself and the twins for genetic testing, and James McGrath moved for summary judgment on October 15, 2002. On March 12,

2003, the trial court issued an order stating James McGrath was not the biological father of the twins.

{¶ 13} Stauber appealed the ruling to this court. We rejected Stauber's claim the Fairfield County court lacked jurisdiction, but remanded the matter to give her one more opportunity to submit to genetic testing. She again failed to do so.

{¶ 14} On March 31, 2004, the trial court issued a judgment entry granting McGrath's motion for summary judgment, finding the paternity acknowledgments were rescinded, and finding no parent-child relationship existed between McGrath and the twins. On appeal, this court affirmed, finding summary judgment in favor of James McGrath was properly based on the law of the case. Stauber did not appeal to the Ohio Supreme Court, or file a motion for Civil Rule 60(B) relief.

{¶ 15} While in California, both children sought medical attention. [T.M.] has Asperger's syndrome, a mild form of autism. [J.M.] has epilepsy and has a cyst on his right temporal lobe. [J.M.]'s doctor states surgery to remove the cyst is absolutely medically necessary.

{¶ 16} Stauber filed a personal injury lawsuit against James McGrath in the State of California alleging [J.M.]'s brain condition was the result of McGrath striking her when she was pregnant.

{¶ 17} Stauber did not have health insurance, and could not obtain it on her own because of her children's pre-existing conditions. She married, however, and her

husband, Ronald Stauber, attempted to adopt the twins so he could add them to his insurance. However, McGrath fought the adoption, and would only give consent if the Stauber dropped the personal injury suit against him. Elizabeth Stauber refused to do so, and Ronald Stauber could not adopt the children. McGrath's action in contesting the adoption is inconsistent with his contention he is not legally the father of the twins.

{¶ 18} In the State of California, [J.M.] and [T.M.], through a guardian ad litem, filed actions for paternity and support. McGrath's California attorneys moved to dismiss the suit, arguing Ohio's judgment should be binding on California under the Full Faith and Credit Clause and because res judicata barred California from reconsidering the paternity of the children. The California court found it could not accord full faith and credit to the 2004 Ohio judgment because Ohio did not properly exercise jurisdiction; it also found res judicata was no bar to a judgment in California. The California court denied McGrath's motion to dismiss, holding [J.M.] and [T.M.]'s rights were never appropriately addressed by the Fairfield County Court of Common Pleas.

{¶ 19} The California court found James McGrath is the father of [J.M.] and [T.M.]. Elizabeth Stauber then sought orders regarding the payment of child support, medical expenses and insurance coverage, which the court granted, including a judgment for arrearages and reimbursements. Stauber and the children then filed the California judgments for enforcement pursuant to UFISA in Case Nos. 06 MI 4,

5, 6, and 7. These were consolidated into Case No. 05 DR 00668 in Fairfield County.

{¶ 20} Finally, Stauber took the twins for DNA testing, which showed James McGrath is the biological father of [J.M.] and [T.M.] with a 99.99 percent chance of probability.

{¶ 21} We will address the issues in the appeal in the paternity case first.

I & II

{¶ 22} In their first two assignments of error, appellants argue the court should not have dismissed the complaint to establish McGrath as the father of the children.

{¶ 23} The trial court found the matter had been fully adjudicated and the matter was now res judicata. The court held appellants are collaterally estopped from asserting appellee is the father of the children. The court concluded neither it nor any other court has jurisdiction to consider the matter, and accordingly dismissed the matter pursuant to Civ. R. 12(B)(1) and (6).

{¶ 24} Our standard of reviewing a court's dismissal for want of subject matter jurisdiction under Civ. R. 12(B)(1) is to determine whether the complaint raises any cause of action cognizable in the forum, see *State ex rel. Bush v. Spurlock* (1989), 42 Ohio St.3d 77.Our standard of reviewing a dismissal for failure to state a claim upon which relief may be granted, made pursuant to Civ. R. 12(B)(6) is to construe all the

factual allegations, and all the reasonable inferences drawn from the factual allegations, in favor of the plaintiff. If it appears the plaintiff can prove no set of facts warranting relief, then dismissal pursuant to Civ. R. 12(B)(6) is appropriate. See, e.g. *State ex rel. Fuqua v. Alexander,* 79 Ohio St.3d 206, 1997-Ohio-169, 680 N.E.2d 985.

{¶ 25} Appellants assert the doctrine of res judicata does not bar the children's complaint for determination of paternity. In *Norwood v. McDonald,* (1943), 142 Ohio St. 299, the Ohio Supreme Court defined the doctrine of res judicata. A previous valid judgment on the merits, without fraud or collusion, entered by a court of competent jurisdiction, is conclusive of the rights, questions, and facts in issue, as to the parties and those in privity, in all subsequent actions in the same or any other judicial tribunal or concurrent jurisdiction, *Norwood* at 305.

{¶ 26} In *Knapp v. Knapp* (1986), 24 Ohio St.3d 141, 144-145, 493 N.E.2d 1353, the Ohio Supreme Court held, "[F]inality requires that there be some end to every lawsuit, thus producing certainty in the law and public confidence in the system's ability to resolve disputes. Perfection requires that every case be litigated until a perfect result is achieved. For obvious reasons, courts have typically placed finality above perfection in the hierarchy of values." Finality is particularly compelling in a case involving determinations of parentage, visitation and support of a minor child. *Strack v. Pelton* (1994), 70 Ohio St.3d 172, 637 N.E.2d 914.While *Knapp* dealt with a motion made pursuant to Civ. R. 60(B), the principle enunciated in *Knapp* applies here as well. This case

has been litigated and re-litigated, and the parties have expended time and money which no doubt could have been used better for these children. It is time for the matter to be final.

{¶ 27} While appellants' arguments may be emotionally attractive, nevertheless, there is a final judgment entered by a court of competent jurisdiction, affirmed by this court, and not appealed to the Ohio Supreme Court, which is dispositive of the issues raised in this case. The trial court was correct in finding neither it nor any other court has jurisdiction to entertain a new action on the same issues.

{¶ 28} We find the court did not err in dismissing the parentage action. Accordingly, the first and second assignments are overruled.

IV

{¶ 29} In light of our holding in I and II supra, the fourth assignment of error is overruled.

III

{¶ 30} In their third assignment of error, appellants argue the court should not have found their actions herein are frivolous. The trial court held they had engaged in a calculated effort to cause appellee a tremendous economic burden.

{¶ 31} The decision to impose sanctions lies within the discretion of the trial court, *State ex rel. Fant v. Sykes* (1987), 29 Ohio St.3d 65, 505 N.E.2d 966. Whether there are good legal grounds to support a

complaint, however, is a question of law reviewable under a de novo standard, *Passmore v. Greene City. Bd. of Elections* (1991), 74 Ohio App.3d 707, 712, 600 N.E.2d 309.When reviewing a trial court's decision to impose sanctions an appellate court must determine: "(1) whether any legal grounds for the pleading exist as a matter of law; and if so, (2) whether the trial court abused its discretion in its determination of whether there was a willful violation of the Rule." *Lorain v. Elbert* (Apr. 22, 1998), Lorain App. No. 97CA006747 (citations omitted). Civ.R. 11 employs a subjective bad faith standard, *Stone v. House of Day Funeral Services., Inc.* (2000), 140 Ohio App.3d 713, 721, 748 N.E.2d 1200.

{¶ 32} We find the filing of this action was not frivolous, and consequently the court erred in awarding sanctions. The third assignment of error is sustained.

{¶ 33} We turn now to the assignments of error in the case to enforce the California orders.

II & III

{¶ 34} Civ. R. 60(B) provides:

{¶ 35} "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B);

(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation."

{¶ 36} In *GTE Automatic Electric Company v. ARC Industries* (1976), 47 Ohio St.2d 146, 351 N.E.2d 113, the Supreme Court held to prevail on a motion brought pursuant to Civ. R. 60(B), the movant must demonstrate: (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ. R. 60(B); and (3) the motion is made within a reasonable time, and where the grounds for relief are Civ. R. 60(B)(1), (2), or (3), not more than one year after the judgment, order, or proceeding was entered or taken.

{¶ 37} McGrath's motion did not specify under what section he sought relief, but his memorandum in support argued appellant Stauber committed fraud; it would be inequitable to enforce the judgment; and other relief is justified, because the California court erred in refusing to honor the previous Ohio order.

{¶ 38} The California court declined to enforce the Ohio judgment, finding Ohio lacked jurisdiction over the children. This court had already determined Ohio had jurisdiction over the children, see *McGrath v. Saret* (December 26, 2003), Fairfield App. No. 03CA26; *McGrath v. Saret,* Fairfield App. No. 04CA27, 2005-Ohio-217. The California court could not overrule this ruling.

{¶ 39} As stated supra, there is a final judgment entered by a court of competent jurisdiction, affirmed by this court, and not appealed to the Ohio Supreme Court, entered prior to the California order. The trial court could not enforce any order contrary to this Ohio judgment. However, we find the trial court exceeded its jurisdiction in the manner in which it dealt with the issues.

{¶ 40} The trial court's judgment entry sustained McGrath's Motion for Relief from Judgment and held the California decision is void. The court vacated the California judgment and dismissed the Motion to Enforce the Foreign Judgment. We find the court erred in doing so.

{¶ 41} No state court has jurisdiction to vacate a judgment entered in another state. While Ohio has the authority to declare a foreign judgment unenforceable in Ohio, the California judgment cannot be vacated except in the jurisdiction in which it was entered. California, or any other state analyzing these conflicting decisions from Ohio and California, may decide to enforce the California judgment over our Ohio decisions in this matter.

{¶ 42} The second and third assignments of error are sustained.

I

{¶ 43} Appellants' first assignment of error argues the trial court should have afforded the California judgment full faith and credit and should have sustained their motion to enforce it. We do not agree. The California judgment is simply not enforceable in Ohio.

{¶ 44} The first assignment of error is overruled.

{¶ 45} For the foregoing reasons, the judgment of the Court of Common Pleas of Fairfield County, Ohio in appellate number 06 CA72, on appeal from Common Pleas No. 06PA00111, is affirmed in part, and reversed as to the award of sanctions. The judgment of the court in appellate number 06 CA 71, on appeal from Common Pleas No. 05 DR 668 is affirmed in part and reversed in part and final judgment is entered pursuant to App. R. 12: Pursuant to App. R. 12(B) we hereby enter the judgment the court should have entered: the Motion to Enforce the Foreign Judgment is overruled, and the California judgment appellants sought to enforce is stricken. The Motion for Relief from Judgment is moot.

GWIN, P.J., and HOFFMAN, J., concurs in part, dissents in part, and EDWARDS, J., concurs, in part.

{¶ 46} I respectfully dissent from the majority. I would sustain Appellant's first and second

assignments of error in Case No.2006-CA-71.[1] The California Court found the Ohio decree was not entitled to full faith and credit because the minors had been denied due process in the Ohio Court proceeding. See, *Durfee v. Duke* (1963), 375 U.S. 106.A judgment rendered in violation of the due process clause is void, subject to collateral attack, and not entitled to full faith and credit elsewhere. *Klienfeld v. Link* (1983) 9 Ohio App 3d 29.

{¶ 47} Appellee chose not to contest, via appeal, the validity of the California Court's decision not to afford the Ohio Court's decree full faith and credit, despite having appeared and defended in California on the minors' complaint there. Appellee does not claim he was denied due process by the California Court; rather, he attempts to collaterally attack that judgment in Ohio via his motion for relief from that judgment.

{¶ 48} Appellee is asserting his argument in the wrong forum. He should have made the argument via appeal in California. I believe the California Court's judgment is entitled to full faith and credit in Ohio, and subject to enforcement.

2006-CA-72

{¶ 49} I concur with the majority to overrule Appellants' first, second, and fourth assignments of error, but disagree with its stated reasons for doing so.

---

[1] Affording full faith and credit to the California Court's judgment renders Appellants' third assignment of error in 2006-CA-71 moot.

Because I find the California Court's decision is entitled to full faith and credit and it preceded in time Appellants' complaint in this case, I believe these assignments of error are moot and any further judicial proceedings thereon unnecessary. It is for that reason I concur with the majority in affirming the trial court's dismissal of Appellants' complaint.

{¶ 50} Finally, I concur in the majority's decision to sustain Appellants' third assignment of error reversing the trial court's finding the action was frivolous and awarding sanctions.

EDWARDS, J., Concurring in Part.

{¶ 51} I concur with the opinion of Judge Gwin regarding the four assignments of error in Case No.2006-CA-72. I write separately to explain why I find that the trial court erred in finding that the appellant minor children have engaged in vexatious litigation.

{¶ 52} While I concur that the paternity case filed by the appellant-minor children was correctly dismissed by the trial court, it is arguable that the pursuit of such case was in the children's best interest. And, there is case law in Ohio that indicates some type of relief may be available to a child or children whose best interests were not adequately represented in a paternity case. See *Ransome v. Lampman* (1995), 103 Ohio App.3d. 8, 658 N.E.2d 313.

{¶ 53} I concur with Judge Gwin as to the analysis and disposition of Case No.2006-CA-71.

APPENDIX B

IN THE COURT OF COMMON PLEAS
FAIRFIELD COUNTY, OHIO
DOMESTIC RELATIONS DIVISION

CASE NO. 05 DR 668

[Filed November 9, 2006]

ELIZABETH STAUBER, ET. AL.	)
	)
PLAINTIFFS,	)
	)
VS.	)
	)
JAMES MCGRATH	)
	)
DEFENDANT.	)
	)

JUDGE: JACKSON

JUDGMENT ENTRY

This matter came on for non-oral hearing upon Defendant's Motion for Relief from Judgment pursuant to Rule 60(B) and various subsections thereof and the motion of the Plaintiffs to liquidate and reduce to judgment foreign judgments.

Upon motion by the Defendant, Judge Berens and Judge Martin of the Fairfield County, Ohio Common Pleas Courts, General Division, with the consent of the Plaintiff, did consolidate Case Nos. 06 MI 4, 06 MI 5, 06 MI 6 and 06 MI 7 on the docket of the Domestic Relations Division of the Fairfield County, Ohio Common Pleas Court, for final determination by this Court of all issues relating to said foreign judgments. The judgment so transferred were foreign judgments rendered by the Superior Court of the State of California for the County of Los Angeles arising from support orders issued by said court in favor of the Plaintiff, Elizabeth Stauber, f.k.a. Cook, f.k.a. Saret, on behalf of her two minor children, and against the Defendant in this case.

The Court has fully considered Defendant's Motion for relief under O.R.C.P. 60(B), the Plaintiffs' Memorandum Contra Defendant's Reply Memorandum, and the case law, statutory law and constitutional law cited by both counsel.

The Court after reviewing this matter finds that the Motion of the Defendant for Relief from Judgment is well taken and is hereby sustained. This Court specifically finds that the determination by this Court in Case No. 01 PA 94, Fairfield County Common Pleas Court, Domestic Relations Division, and the later affirmation of that decision by the Ohio Fifth District Court of Appeals, which order was never appealed to the Ohio Supreme Court, constituted a full and final determination that the Defendant herein was not and is not the father of the minor children in question in this case and that no parent-child relationship exists between the Defendant and either child. This Court

finds that said determination was entitled to full faith and credit under Article IV, Section 1 of the United States Constitution in any Court of other jurisdiction in the United States of America. Accordingly, this Court finds that the decision by the Superior Court of the State of California for the County Los Angeles in Case No. BF02 6800 determining that the Defendant was the father of the minor children is void and any judgments arising therefrom for child support, payment of children's medical expenses, payment of the Plaintiff's attorneys fees, and/or payment for health insurance premiums or any other expenses for the mother of the children, the guardian ad litem for the children or the children themselves are void.

Accordingly, this Court does hereby sustain the Motion of the Defendant and sets aside and vacates the judgments filed with this Court on March 24, 2006 and which have been styled as Case Nos. 06 MI 4, 06 MI 5, 06 MI 6 and 06 MI 7 on the docket of the Court of Common Pleas, Fairfield County, Ohio, General Division.

This Court does hereby dismiss the Motion of the Petitioners, [J.M.] and [T.M.] for an order to liquidate and reduce to judgment child support, arrearages, owed by the Respondent, James McGrath, with prejudice inasmuch as said Motion was based upon the judgments which this Court finds to be void.

The Clerk of this Court is hereby ordered to journalize this Judgment Entry and to make notation of the aforesaid Judgment Entries that said judgments have been vacated.

IT IS ORDERED. Costs to the Plaintiffs.

There being no just cause for delay, this judgment shall be a final appealable Order.

/s/
S. FARRELL JACKSON
Judge of Said Court

The Clerk of Courts is directed to serve upon all parties notice of this judgment and its date of entry upon the journal and pursuant to Rule 5(B) of the Ohio Rules of Civil Procedure.

2

No. 08-91

Supreme Court, U.S.
FILED
SEP 18 2008
OFFICE OF THE CLERK

In The

Supreme Court of the United States

ELIZABETH STAUBER
and
J.M. and T.M.

Petitioners,

v.

JAMES MCGRATH,

Respondent.

On Petition For Writ Of Certiorari To The Fifth District Court Of Appeals Of Ohio

BRIEF FOR RESPONDENT JAMES MCGRATH IN OPPOSITION

STEBELTON, ARANDA & SNIDER, LPA, by

GERALD L. STEBELTON
Counsel of Record
DANIEL J. FRUTH
109 North Broad Street,
Suite 200
Lancaster, Ohio 43130
(740) 654-4141

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether an intermediate Ohio court contravened the Full Faith and Credit Clause by declining to enforce California child support orders, where California had improperly failed to honor an earlier Ohio paternity judgment and where the California judgments were obtained as part of a fraudulent litigation strategy in which Petitioners had failed to obey repeated Ohio orders to obtain genetic testing in order to further a separate personal injury action against Respondent.

PARTIES

Petitioners

Elizabeth Stauber (Formerly known as "Elizabeth Saret-Cook," "Elizabeth Cook," and "Elizabeth Saret")

T.J.M., minor child

J.S.M., minor child

Respondent

James McGrath

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
JURISDICTION	1
STATEMENT	1
REASONS FOR DENYING THE PETITION	8
CONCLUSION	27

TABLE OF AUTHORITIES

Page

SUPREME COURT CASES:

Baker v. General Motors Corp., 522 U.S. 222 (1998) 24

Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367 (1996) 24

Morris v. Jones, 329 U.S. 545 (1947) 21

New York ex rel. Halvey v. Halvey, 330 U.S. 610 (1947) 9

Sutton v. Leib, 342 U.S. 402 (1952) 21

OTHER FEDERAL AND STATE CASES:

Caldwell v. Taylor, 218 Cal. 471, 23 P.2d 758 (1933) 10, 11

Campion v. Dept. of Community & Regional Affairs, 876 P.2d 1096 (Alaska 1994) 22, 23

Colby v. Colby, 78 Nev. 150, 369 P.2d 1019 (1962) 23

Colley v. Bazell, 64 Ohio St.2d 243, 416 N.E.2d 605 (1980) 10

Estate of Sanders, 40 Cal. 3d 607, 710 P.2d 232 (1985) 13

Greer-Burger v. Temesi, 116 Ohio St.3d 324, 879 N.E.2d 174 (2007) 13

In re Nicholas H., 28 Cal.4th 56, 46 P.3d 932 (2002) 12

TABLE OF AUTHORITIES – Continued

Page

In re Marriage of Modnick, 33 Cal.3d 897, 663 P.2d 187 (1983) 10

Jackson v. Los Angeles, 60 Cal. App. 4th 171 (1997) 13

Jensen v. Barnes, 33 Colo. App. 333, 519 P.2d 1223 (1974) 23

Kay v. Marc Glassman, Inc., 76 Ohio St.3d 18, 665 N.E.2d 1102 (1996) 10

Klumpner v. Klumpner, 182 Ill. App. 3d 22, 537 N.E.2d 914 (1989) 22

Kubron v. Kubron, 51 Cal. 2d 229, 331 P.2d 636 (1958) 17

Marriage of Hanley, 199 Cal. App. 3d 1109 (1988) 22

Medveskas v. Karparis, 161 Vt. 387, 640 A.2d 543 (1994) 24

McGrath v. Saret (Dec. 26, 2003) Fairfield App. No. 03CA26 (*McGrath I*) 3

Saret-Cook v. Gilbert, Kelly, Crowley & Jennett, 74 Cal.App.4th 1211 (Cal.App. 2 Dist., 1999) ... 20, 25

Stuart v. Lilves, 210 Cal. App. 3d 1215 (1989) 22, 23

Sullivan v. Sullivan, 98 Ill. App. 3d 928, 424 N.E.2d 957 (1981) 22

Teledyne Industries, Inc. v. Natl. Labor Relations Bd. 911 F.2d 1214 (C.A. 6 1990) 13

Winkler v. Stowe (Ohio App. Jan. 21, 1997), 4th Dist. No. 95 CA 763, 1997 WL 30947 25

TABLE OF AUTHORITIES – Continued

Page

STATUTES:

28 U.S.C. § 1738A 26

28 U.S.C. § 1738B 26

Cal.Fam.Code § 7611 12

Ohio Revised Code 2329.022 13

OTHER AUTHORITIES:

Eugene F. Scoles and Peter Hay, Conflict of Laws (3d ed. 2000) 10

Restatement (Second) of Judgments 19

Ruth B. Ginsburg, *Judgments in Search of Full Faith and Credit: The Last-in-Time Rule for Conflicting Judgments*, 82 Harv. L. Rev. 798, 800 (1969) 22, 24

Uniform Child Custody Jurisdiction and Enforcement Act 26

Uniform Parentage Act 26

BRIEF OF RESPONDENT IN OPPOSITION

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a) to review the Ohio Fifth District Court of Appeals' decision in Court of Appeals Case No. 06 CA 71. *See* Pet. App. 3a. To the extent that review is sought in the consolidated Case No. 06 CA 72, *see* Pet. App. 1a-2a, jurisdiction is lacking as that case does not involve a constitutional or other federal issue.

STATEMENT

In early 1999, Petitioner Stauber (then known as Elizabeth Saret-Cook) and Respondent McGrath met in Ohio and developed a relationship, with Petitioner Stauber ultimately moving into Respondent's home. Unknown to Respondent, Petitioner Stauber was married at that time to Tommy M. Cook. *See* Petition for Dissolution of Marriage, Feb. 16, 2000, Los Angeles County Superior Court, No. BD317390 (indicating a marriage date of October 7, 1984). On March 29, 2000, Stauber gave birth to twin boys, Petitioners T.M. and J.M. Opp. App. 2. Not knowing that Stauber was married to another man at the time of conception, Respondent filed an Acknowledgement of Paternity in Ohio in June, 2000. *Id.*; Petition for Dissolution of Marriage, Feb. 16, 2000, Los Angeles County Superior Court, No. BD317390.

Stauber and McGrath soon parted ways, and in an effort to establish rights and obligations relating

to the twins, on March 6, 2001, they signed an Agreed Entry, that, *inter alia*, specifically required Stauber, McGrath and the twins to submit DNA samples in order to determine if McGrath was in fact the twins' father. Opp. App. 2. The Agreed Entry further stipulated that the Fairfield County, Ohio, Court of Common Pleas, Domestic Relations Division "has full personal, in rem and subject matter jurisdiction over all issues in this Entry and that said court shall be the exclusive court of jurisdiction for any future issues relating to the children unless both Plaintiff (Stauber) and Defendant (Respondent) consent to a change of jurisdiction in writing." Respondent timely submitted a DNA sample, but Stauber refused to submit samples for herself or the children, and moved to California with the twins. Opp. App. 2.

Given Stauber's failure to submit to testing, Respondent timely filed an action in June, 2001 to rescind his acknowledgement of paternity in the Fairfield County Court of Common Pleas, Domestic Relations Division. Pet. App. 4a. All of the parties to the instant action, including the minor children, J.M. and T.M., were before the Ohio trial court in that action to litigate the issue of paternity. In August, 2002, the trial court ordered Stauber to submit herself and the twins for genetic testing. When she did not do so, McGrath moved for summary judgment on October 15, 2002. Pet. App. 4a. On March 12, 2003, the trial court granted summary judgment and issued an order rescinding the acknowledgement of

paternity and concluding that James McGrath was not the biological father of the twins. Pet. App. 4a, 5a.

The trial court's order was reviewed by the Fifth District Court of Appeals of Ohio. In addressing the appeal, the Court noted that the appeal challenged the jurisdiction of the trial court to order genetic testing, alleging failure of service on Petitioner Stauber and her twins. Opp. App. 2, 5; *McGrath v. Saret* (Dec. 26, 2003) Fairfield App. No. 03CA26 (*McGrath I*); *see* Opp. App. 5. Citing the Agreed Entry's stipulation to jurisdiction, the Court of Appeals found that the trial court had personal and subject matter jurisdiction over the case. The Court of Appeals gave Stauber an additional opportunity to submit to testing, stating, "Now that we have found jurisdiction, appellant is to carry out the trial court's order of August 28, 2002 and submit herself and the twins for genetic testing within thirty days . . . " *McGrath v. Saret* (Dec. 26, 2003) Farifield App. No. 03CA26 (*McGrath I*); Opp. App. 2, 3.

Petitioner Stauber again failed to submit to genetic testing. Opp. App. 3. On March 31, 2004, the trial court granted summary judgment to McGrath, finding no parent-child relationship. *Id.* On appeal, the Fifth District observed that Stauber "essentially re-asserts her position that the service of process by publication on appellee's complaint was insufficient and that California is the proper forum for the parties' dispute." Opp. App. 5. Finding that the issue had been previously resolved, the Ohio Court of Appeals

affirmed the trial court's grant of summary judgment, and no further review was sought. Pet. App. 13a.

Meanwhile, in California, Petitioners had filed a personal injury lawsuit against James McGrath for alleged injuries to the twins in vitro, in Los Angeles County Superior Court, No. BC345601. In addition, while flatly ignoring the orders of the Ohio courts in the paternity proceeding to obtain genetic testing, Petitioner Stauber filed an additional paternity action in the Los Angeles County Superior Court, No. BF018828. On August 20, 2004, that court determined that it was bound by the Ohio grant of summary judgment, concluding that McGrath was not the father of the twins, and noting that the Ohio order, "must be and is afforded full faith and credit and res judicata effect in these proceedings." Opp. App. 7, 8.

Petitioners T.M. and J.M. filed a new paternity action in the same court, through guardian ad litem, Mikhael Cook, another son of Elizabeth Stauber. The case was assigned to a different judge, who refused to extend Full Faith and Credit to the Ohio finding of non-paternity, concluding that the children were not presented with adequate notice and opportunity to be heard in the Ohio proceeding and that their mother did not appropriately represent their interests. No. BF026800, August 12, 2005, Transcript at 26, Los Angeles Superior Court. Accordingly, one California trial court extended Full Faith and Credit to the Ohio finding of non-paternity, and another did not.

Petitioners then obtained several child support judgments against McGrath based upon both paternity actions, both without genetic testing. A support order arose in the first California paternity action, BF018828, because even though it ultimately found non-paternity, prior to rendering such a ruling, it had awarded judgments that were limited to interim amounts and arrearages. The court in the second California paternity action, BF026800, however, issued a prospective support order.

Petitioners returned to Ohio and filed the California judgments with the Ohio courts in both Fairfield County and adjoining Franklin County. In Fairfield County, the proceedings on the foreign judgments were consolidated in Fairfield County Court of Common Pleas, Domestic Relations Division, No. 05 DR 668. In addition, Petitioners filed a new paternity action in the Fairfield County Common Pleas, Domestic Relations Division, No. 06 PA 111.

The trial court granted summary judgment in favor of Respondent in the new paternity action, finding its earlier paternity decision in 2004 to be res judicata. Pet. App. 2a, 9a, 17a. With respect to enforcement of the California judgments, the court sustained McGrath's motion for relief from judgments pursuant to Ohio Civ. Rule 60(B) and refused to enforce the foreign judgments. Pet. App. 16a-19a.

The two decisions were appealed to the Fifth District Court of Appeals of Ohio in separate appeals, which were consolidated for decision. Pet. App. 1a.

Stauber finally revealed in both the trial court and the Court of Appeals briefing that her failure to produce the children for genetic testing was motivated by a belief that the insurance policy applicable in the personal injury action that petitioners were pursuing against McGrath would exclude coverage for acts against family members. Brief of Plaintiffs-Appellants Elizabeth Stauber, J.S.M. and T.J.M., Minor Children, Ohio Fifth District Court of Appeals No. 06 CA 71, at 8-9; Brief of Plaintiffs J. and T.M., Minor Children, Through Their Mother and Next Friend Elizabeth Stauber, Fairfield County Court of Common Pleas Case No. 06 PA 111, at 9, 10. Petitioners' brief explained:

> "[I]f McGrath were determined to be the father of [JSM], his health (sic) insurance would not pay for the enormous costs of [JSM]'s medical care. Rightly or wrongly, Stauber's failure to submit to DNA testing of her sons in Ohio litigation stemmed partly from her belief that she could help her sons more if paternity were *not* legally established. *Id.* at 9, 10.

In the paternity action, Ohio Court of Appeals No. 06 CA 72, Petitioners argued, as they had in the trial court, that application of res judicata was improper because the earlier Ohio decisions were "not on the merits" or did not involve the same parties. Brief of Plaintiff-Appellants Elizabeth Stauber, J.S.M. and T.J.M., minor children, Ohio Fifth District Court of Appeals, No. 06 CA 72 at 13-14; Brief of

Plaintiffs J. and T.M., Minor Children, Through Their Mother and Next Friend Elizabeth Stauber, In Support of Their Complaint to Establish Parentage Against James McGrath; Fairfield County Court of Common Pleas, Domestic Relations Div., No. 06 PA 111. No Full Faith and Credit argument was raised regarding the new paternity action, nor was it argued that the intervening California order made giving res judicata effect to the earlier Ohio order improper. The Court of Appeals rejected Petitioners' arguments. Pet. App. 7a-9a.

In the foreign judgment action, Court of Appeals No. 06 CA 71, Petitioners argued that the trial court had erred in failing to enforce the foreign judgments and that such failure violated Full Faith and Credit. The Court of Appeals observed that it had "already determined Ohio had jurisdiction over the children," and that the California court had failed to honor that determination. Pet. App. 12a. The Court concluded that the trial court had correctly concluded that the California judgment was "not enforceable in Ohio." Pet. App. 13a.

Petitioners sought review in the Ohio Supreme Court, which declined jurisdiction. Pet. App. 20a.

REASONS FOR DENYING THE WRIT

To be sure, the course of paternity and support proceedings between the parties to date is unsatisfying, with litigation rebounding from Ohio to California, and back, over a seven-year period. The unfortunate course of this case arises, however, not because of any recurring legal issue that requires resolution by this Court, but because Petitioner Elizabeth Stauber consciously defied repeated Ohio court orders to submit herself and her children to genetic testing that would have determined whether Respondent McGrath was in fact the father of the minor Petitioners in order to further her cause in a separate personal injury action against Respondent.

The serious issues of fraud and inequity that are raised by Stauber's conduct make the resulting California support judgments unworthy of Full Faith and Credit wholly apart from the "last in time" issue on which Petitioner seeks review. Moreover, deciding the Full Faith and Credit issue Petitioners present cannot clear up the interstate disagreement in this case in any event, as the portion of the decision below addressing Petitioner's recent Ohio paternity action did not involve that, or any other constitutional issue, and is therefore not subject to the Court's jurisdiction. Indeed, because Petitioners filed that new Ohio paternity action after having received support judgments based on California's finding of paternity, Ohio's renewed finding of non-paternity is now itself "last in time" on that issue, substantially rendering moot whether Ohio should have honored the California

support judgments. The limited analysis in the unpublished intermediate court decision below, along with Ms. Stauber's unreliable conduct as a litigant, are further problems with this case as a vehicle.

In any event, the issue on which petitioners seek review does not warrant this Court's attention. The situation involved is a narrow one, and the body of state court caselaw addressing the situation is aging and not well developed. In addition, the area of child support is one where uniformity and interstate coordination are the subject of ongoing interstate and national efforts through federal and uniform laws. The petition should be denied.

I. This Case is an Extremely Poor Vehicle For Addressing Any Full Faith and Credit Issue

A. The Case Involves Serious Issues of Fraud, Misconduct, and Estoppel that Warrant Declining to Enforce the California Judgments Under Any Understanding of the Full Faith and Credit Clause

Under the Full Faith and Credit Clause and implementing legislation, the credit that is due foreign judgments is limited to that which the judgments would receive "in the courts of such State, Territory or Possession from which they are taken." 28 U.S.C. § 1738, *accord New York ex rel. Halvey v. Halvey*, 330 U.S. 610, 614 (1947). The California

courts, like the Ohio courts, recognize that a judgment obtained by fraud or whose enforcement is otherwise inequitable warrants relief from judgment in appropriate circumstances. *See, e.g., Caldwell v. Taylor*, 218 Cal. 471, 475, 23 P.2d 758, 759 (1933) ("The jurisdiction of equity to afford appropriate relief from judgments generally . . . upon a showing of proper circumstances is well settled."); *In re Marriage of Modnick*, 33 Cal.3d 897, 905, 663 P.2d 187, 191 (1983) (relief from judgment is available for "almost any set of extrinsic circumstances which deprive a party of a fair adversary hearing"); *Colley v. Bazell*, 64 Ohio St.2d 243, 248, 416 N.E.2d 605, 609 (1980) (relief from judgment seeks to "strike a proper balance between the conflicting principles that litigation must be brought to an end and justice should be done"); *Kay v. Marc Glassman, Inc.*, 76 Ohio St.3d 18, 20, 665 N.E.2d 1102, 1104 (1996) (the rule granting relief from judgment is "a remedial rule to be liberally construed so that the ends of justice may be served"); *see also* Eugene F. Scoles and Peter Hay, Conflict of Laws § 24.17 (3d ed. 2000) (noting fraud, mistake, and equitable exceptions as rendering the full faith and credit due to the judgment of a sister state inapplicable). Such circumstances exist here.

The history of this litigation—indeed, of Mr. McGrath's entire relationship with petitioner Stauber—is one of concealment and fraudulent conduct. First, Stauber concealed from Respondent the fact that at the time the twins were conceived, she was actually married to another man. Respondent's initial Ohio

acknowledgment of paternity was made in ignorance of this critical information. Stauber also did not share this information with the Ohio courts during the litigation regarding rescission of McGrath's paternity acknowledgment, or with the California courts addressing paternity and support. *Cf. Caldwell*, 218 Cal. at 478-479 (concealment of true identity and marital status deemed fraud warranting relief from probate judgment).

Stauber's concealment did not stop there. Next, Stauber consciously defied repeated Ohio court orders to submit herself and her children to genetic testing in order to create a better insurance coverage argument in a California personal injury action seeking damages from McGrath for alleged injuries in vitro. In short, Petitioners sought to *avoid* a determination of paternity in order to escape application of a "family member" exclusion in McGrath's homeowner's policy in the California personal injury case. This strategy of manipulation succeeded, with Petitioners agreeing to a settlement of $320,000 in the personal injury action in October, 2007.

The intentional refusal to timely submit to paternity testing represented a deliberate effort to conceal information relevant to the insurance coverage at issue in the personal injury action. Moreover, this strategy of manipulation, which has come to light only in the present Ohio litigation, left McGrath disadvantaged in the California paternity and support litigation. Respondent was not aware of the reason for Petitioners' ongoing failure to submit to

testing, and thus was not able to raise arguments related to that refusal and to Petitioners' inconsistent litigation strategy. Nor, due to Stauber's concealment, was Respondent aware at that time that Stauber was married to another man during his relationship with her, a fact which certainly could have been relevant to the California court's willingness to determine McGrath's paternity without any genetic test results, treating him as "a presumed father." *See* Los Angeles County No. BF026800, August 12, 2005, Transcript at 21; *see also* Cal.Fam.Code § 7611 ("A man is presumed to be the natural father of a child if . . . (a) He and the child's natural mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated . . . "); *In re Nicholas H.*, 28 Cal.4th 56, 58, 46 P.3d 932, 933 (2002) (statute establishes a "rebuttable presumption affecting the burden of proof and may be rebutted in an appropriate action only by clear and convincing evidence."). Moreover, by engaging in this multi-forum manipulation rather than simply submitting to the tests ordered by the Ohio courts, Petitioners subjected McGrath to more than $250,000 in attorney's fees, ensuring that he would have few resources left to pursue litigation by the time the full extent of Stauber's misconduct came to light.

Petitioners' deceptive litigation strategy deprived McGrath of a full and fair opportunity to defend himself in the California paternity and support litigation, and, as such, warrants relief from the

judgments obtained in those actions under both California and Ohio law. *See, e.g., Estate of Sanders*, 40 Cal. 3d 607, 614, 710 P.2d 232, 236 (1985) (allowing relief from judgment for fraud serves "the policy in favor of a fair adversary proceeding in which each party is provided an opportunity to fully present its case"). Moreover, having benefited in the personal injury action from *avoiding* a finding of paternity, principles of judicial estoppel prevent Petitioners from asserting and benefiting from the contrary position. It is "patently wrong to allow a person to abuse the judicial process by first [advocating] one position, and later, if it becomes beneficial, to assert the opposite." *Jackson v. Los Angeles*, 60 Cal. App. 4th 171, 181 (1997); *see also Greer-Burger v. Temesi*, 116 Ohio St.3d 324, 330, 879 N.E.2d 174, 183 (2007), *quoting Teledyne Industries, Inc. v. Natl. Labor Relations Bd.* 911 F.2d 1214, 1217 (C.A. 6 1990) ("Courts apply judicial estoppel in order to 'preserve the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship, achieving success on one position, then arguing the opposing to suit an exigency of the moment' ").

When Petitioners filed the California judgments in Ohio, Respondent McGrath filed a motion under Ohio Civil Rule 60(b) for relief from the judgments. This procedure is in keeping with the Uniform Enforcement of Foreign Judgments Act, as codified in Ohio at Ohio Revised Code Section 2329.022, which provides that a foreign judgment filed for

enforcement in Ohio is subject to "the same procedures, defenses, and proceedings for reopening, vacating, or staying as a judgment of a court of common pleas." McGrath argued not only that Full Faith and Credit should not be given to the California judgments due to their disregard of the earlier Ohio decisions, but also that Rule 60(b) relief was appropriate here on the basis of fraud and misconduct by Petitioner Elizabeth Stauber and to relieve McGrath from the inequitable and unjust operation of the California judgments in this case. Defendant's 60(b) Motion at 14-16, Fairfield County Court of Common Pleas, No. 05 DR 668. These arguments were also pressed on appeal. Brief of Defendant/Appellee, James S. McGrath at 18-19, Ohio Fifth District Court of Appeals, No. 06 CA 71.

Because these additional arguments constitute independent reasons for declining enforcement of the California judgments, Petitioners would not be entitled to enforcement of the California judgments even if this Court agreed with them on the question presented in their Petition. Indeed, consistent with constitutional avoidance principles, the Court should not decide the Full Faith and Credit issue presented when the decision below may be correct on other fact-intensive grounds that certainly raise no certworthy issue.

B. Resolution of the Question Presented Would Not Resolve the Interstate Concerns Petitioners Identify in this Case

At the completion of the second California paternity litigation, BF026800, two things occurred back in Ohio: (1) Petitioners filed several support judgments from the California litigation with the Ohio courts for enforcement; and (2) Petitioners filed a new paternity action in Ohio. As explained, *supra,* Petitioners' arguments in the trial and appellate courts in the Ohio paternity action, 06 PA 111/06 CA 72, did not invoke the Full Faith and Credit Clause in any fashion, instead simply challenging the application of Ohio res judicata law to the earlier Ohio judgments on the basis that the previous Ohio decision was not "on the merits" and did not involve all of the parties. As such, the Ohio Court of Appeals opinion as to the paternity appeal did not discuss, or even mention, the Full Faith and Credit Clause. Pet. App. 7a-9a. Petitioners apparently do not seek review of the decision of 06 CA 72 in this Court.[1]

The Ohio paternity action that was the focus of 06 CA 72 raised only state law issues and, thus, is not

---

[1] Petitioners' arguments appear to focus on the enforcement of the foreign judgments, and the Petition Appendix did not include the trial court opinion in the paternity action as would be required by this Court's Rule 14(i) if review were sought of that decision. To the extent that Petitioners do intend to seek certiorari in the paternity action, there is no basis for this Court's jurisdiction.

at issue here. Therefore, the Ohio Court of Appeals decision in *that* matter now represents a final determination that Respondent McGrath is not the father of the minor Petitioners. Thus the emotional conundrum posed by the Petition—that California treats McGrath as the father but Ohio does not (Pet. at 2)—cannot be solved by review of the Ohio Court of Appeals decision regarding enforcement of the California support judgments. Indeed, because this unchallenged Ohio holding as to paternity now represents the "last in time" word on that issue, it should, under Petitioners' own theory, be respected in all jurisdictions.

C. The Issues Were Not Well-Developed Below

The analysis of the Full Faith and Credit Clause in the unpublished intermediate appellate opinion from which Petitioners seek review consists of the following: "The California judgment is simply not enforceable in Ohio." Pet. App. 13a. There is no discussion of the body of case law involving the treatment of inconsistent judgments under the Full Faith and Credit Clause. Indeed, the majority opinion does not cite a single decision of this Court for any point.

The limited analysis of the issue undertaken by the Court of Appeals' unpublished opinion reflects the focus of Petitioners' briefing at that stage. While arguing generally that Full Faith and Credit was

required for the California judgments, the primary thrust of Petitioners' arguments was that the California court was justified in failing to give Full Faith and Credit to the earlier Ohio judgments. Brief of Plaintiffs-Appellants Elizabeth Stauber, J.S.M. and T.J.M., Minor Children Ohio Fifth District Court of Appeals, No. 06 CA 71 at 13-27. Petitioners' briefing did not call the Court of Appeals' attention to any caselaw from this or any other court regarding the "three-step conflict-of-judgments problem" they now emphasize (Pet. at 7). The scant development of these points below presents a poor platform for this Court's consideration of the issues raised.

D. Several Other Factors Make this Case a Poor Vehicle

Petitioners are not merely seeking to have the Ohio courts enforce foreign judgments in contradiction to their own earlier decisions, they are doing so in a situation where orders of the Ohio courts were blatantly ignored by Petitioner Stauber in the earlier Ohio action. As such, this situation implicates special considerations regarding maintaining the integrity of the Ohio courts that would not be present in most cases involving inconsistent judgments. *Cf. Kubron v. Kubron*, 51 Cal. 2d 229, 331 P.2d 636 (1958) (California courts properly refused to enforce a Nevada judgment which was obtained in defiance of an earlier California temporary restraining order).

Moreover, the personal jurisdiction of the California court over Mr. McGrath in Case No. BF026800 was never resolved. Respondent filed a Motion to Quash Service of Summons for Lack of Personal Jurisdiction, but it was never ruled upon by the Court. As articulated in that Motion, McGrath was not, and had never been, a California resident, he owns no property in California, and he was not present in California during the time period during which the boys were conceived. Nor did he ever enter a general appearance in that proceeding. *See* Superior Court, County of Los Angeles, No. BF026800, August 12, 2005 Transcript at 39, 41 (noting McGrath had only made a special appearance). Moreover, McGrath's Agreed Entry with Stauber in Ohio had stipulated that the Fairfield County Court of Common Pleas in Ohio had exclusive jurisdiction for any future issues relating to the children. In these circumstances, whether the California courts properly had jurisdiction is highly questionable, and provides yet another basis for the Ohio courts to have declined Full Faith and Credit to the judgment in that case.

The California court's decision in No. BF026800 not to give Full Faith and Credit to the earlier Ohio judgments was clearly incorrect. The California court erred in determining that the Ohio courts had lacked jurisdiction over the minors when the Ohio courts had considered and decided the jurisdictional issue in the earlier litigation. *See*, *e.g.*, Opp. App. 8. Since the Ohio courts certainly had "jurisdiction to decide their jurisdiction," the Ohio decisions thereon should have

been determinative in the California proceeding. *See, e.g.,* Restatement (Second) of Judgments, § 96.

Finally, the Court should hesitate to attempt resolution of any important issue in a case in the hands of Petitioner Elizabeth Stauber. As explained, *supra,* Petitioner Stauber's conduct during the multiple layers of litigation regarding her children's paternity and support has been outrageous. Her conduct led the Ohio trial court in this action to deem her a vexatious litigant. *See* Pet. App. 2a. The California court stated that "Mother's actions thwarted Ohio's and Father's ability to properly apply Ohio law," deemed her behavior "extremely troubling," and questioned whether she was motivated by "vitriol or stupidity." Los Angeles County Superior Court, No. BF026800, August 12, 2005 Transcript at 20-21.

Stauber has engaged in similarly outrageous conduct in prior litigation. One such abuse was described by the California Court of Appeals as follows:

> This case concerns the nightmarish aftermath of a failed office romance between Saret-Cook and the individual respondent, a real-life tragedy similar to the movie "Fatal Attraction." The evidence shows a relentless campaign of harassment by Saret-Cook against the individual respondent, tenaciously pursued with brutal effect. Both personal suffering and professional disaster resulted.

Saret-Cook v. Gilbert, Kelly, Crowley & Jennett, 74 Cal.App.4th 1211, 1216 (Cal.App. 2 Dist., 1999). Stauber has now repeated here her practice of brutalizing a man—with whom she had a past romantic relationship—by way of relentless litigation.

II. Even if this Case Were an Appropriate Vehicle, Petitioners' Question Presented Is Not Certworthy

As the Petition recognizes (Pet. 7), "the three-step conflict-of-judgments problem posed to the Ohio appellate court is nothing new, and outside of the subset of cases where the first and third forum are the same, there is general agreement nationwide that the second-in-time judgment is due full faith and credit in the third forum." Petitioners claim that differing approaches among some state courts as to the proper outcome when the first and third fora are the same warrant this Court's attention. The body of law they identify, however, is aging, is not well developed, is implicated infrequently, and is of lessening significance in light of federal enactments and uniform laws applicable to interstate family law issues. Petitioners certainly do not demonstrate any "compelling reason" for this Court's review. Sup. Ct. Rule 10.

First, Petitioners acknowledge that the decision of the Ohio Court of Appeals is not inconsistent with any decision of this Court. While suggesting that the Ohio Court of Appeals decision "rest[s] uneasily in the

shadow" of certain "statements" in *Morris v. Jones*, 329 U.S. 545 (1947) and *Sutton v. Leib*, 342 U.S. 402 (1952), (Pet. at 10), the Petition itself acknowledges (Pet. at 11) that neither of those cases is directly applicable here. That is exactly correct. In *Morris*, this Court required Illinois to enforce a Missouri judgment in conflict with an earlier Illinois decree where that Illinois decree was never raised in the Missouri courts. That is quite different from the situation here, where the earlier Ohio decisions were brought to the attention of the California courts, but not given Full Faith and Credit in the California paternity action. *Sutton* is even further from the point, as it did not involve any attempt to enforce an out-of-state judgment in conflict with an earlier decision of the forum state. Further, as Petitioner recognizes, any discussion regarding that situation was dictum.

The Petition similarly fails to demonstrate any split of authority among state courts that warrants this Court's attention. Although attempting to portray the Ohio Court of Appeals decision here as departing from the usual and proper rule, the Petition does not bother to identify even one state court case that has actually adopted the position *contrary* to that taken by the Ohio Court of Appeals, enforcing a foreign judgment which conflicts with an earlier judgment of the forum, and which was called to the foreign court's attention. This omission appears to be for good reason. Respondent is aware of very few state courts even addressing the issue in the

thirty-nine years since Justice Ginsburg's article on the topic. *See* Ruth B. Ginsburg, *Judgments in Search of Full Faith and Credit: The Last-in-Time Rule for Conflicting Judgments*, 82 Harv. L. Rev. 798, 800 (1969).

Two intermediate state courts in the 1980's did render decisions that might be viewed as inconsistent with that reached below. *See Marriage of Hanley*, 199 Cal. App. 3d 1109 (1988); *Sullivan v. Sullivan*, 98 Ill. App. 3d 928, 424 N.E.2d 957 (1981). However, other intermediate courts in these same states have rendered decisions which the Petition cites as *consistent* with that taken by Ohio below. *See* Pet. at 8, citing *Stuart v. Lilves*, 210 Cal. App. 3d 1215 (1989) and *Klumpner v. Klumpner*, 182 Ill. App. 3d 22, 537 N.E.2d 914 (1989). Wherever these cases leave the law within those two states, any intrastate uncertainties among intermediate appellate courts do not require this Court's involvement.

Respondent is aware of only one State Supreme Court that has arguably taken the position Petitioners desire in the thirty-nine years since the Ginsburg article. In *Campion v. Dept. of Community & Regional Affairs*, 876 P.2d 1096 (Alaska 1994), the district court for the Virgin Islands had concluded that an earlier Alaska default judgment was invalid for improper service of process. When enforcement of the original Alaska default judgment was subsequently sought in the Alaska courts, the Alaska Supreme Court concluded that the intervening Virgin Islands

decision collaterally estopped it from considering the appropriateness of service in the original action.

The Court rejected the proposition that "neither collateral estoppel nor the full faith and credit clause . . . require that the forum state's courts must give effect to a sister state judgment holding that a prior judgment of the forum state is void." *Campion*, 876 P.2d at 1100. The creditor had cited one of the cases identified and criticized by the Ginsburg article, *Colby v. Colby*, 78 Nev. 150, 369 P.2d 1019 (1962), for this proposition, but the Alaska Supreme Court did not necessarily attribute the rejected view to *Colby*, only calling that case unpersuasive "to the extent" it could be read to support that position. Moreover, the Court did *not* reject the principle, attributed by the Court to *Jensen v. Barnes*, 33 Colo. App. 333, 519 P.2d 1223 (1974) and *Stuart v. Lilves*, 210 Cal. App. 3d 1215 (1989) (two cases identified by the present Petition as consistent with the decision below (Pet. at 8)), that "when the courts of two states have reached conflicting decisions on the same issue and one of the conflicting decisions was rendered by a court of the state in which the current action is pending, that decision is controlling." *Campion*, 876 P.2d at 1099. Instead, the Alaska Court simply reasoned that because the original case involved a default judgment, none of the issues was "actually litigated," so that there were not, as in those cases, conflicting in-state and out-of-state judgments on the same issue. *Id.*

As to cases agreeing with the decision below, the body of caselaw is also limited. The Petition observes (Pet. at 8) that Justice Ginsburg's article noted four state decisions that, as of 1969, appeared to endorse an exception to the last-in-time rule when the first-in-time decision issued from a court in their state. The petition cites five additional state appellate decisions as subsequently adopting this view (Pet. at 8), including the intermediate California and Illinois decisions already mentioned as in tension with other decisions in those states. The most recent of the five cited decisions was fourteen years ago, and that case is the only one of the five that arose from a state court of last resort. *See Medveskas v. Karparis*, 161 Vt. 387, 395, 640 A.2d 543, 547 (1994).

In sum, given the relatively small number of cases meaningfully addressing the issue, particularly in state supreme courts, and particularly in recent years, this is hardly a body of law that reveals any important and current conflict requiring resolution by this Court. This is all the more true in light of the intervening guidance this Court has provided regarding the Full Faith and Credit Clause as it applies to judgments—guidance that the cited decisions did not have the opportunity to consider. *See, e.g., Baker v. General Motors Corp.*, 522 U.S. 222 (1998); *Matsushita Elec. Indus. Co. v. Epstein,* 516 U.S. 367 (1996).

The decision below certainly adds nothing to this mix. Although Respondent believes the result was well founded, as an unpublished opinion of an intermediate Ohio court, the decision cannot be taken as

meaningfully representing the considered position of the Ohio courts. Indeed, in unsuccessfully attempting to persuade the Ohio Supreme Court to hear the case, the Petitioners urged that "Ohio courts themselves are not in accord" on the issue presented. Ohio Supreme Court No. 2008-0025, Memorandum of Appellants J.M. and T.M. in Support of Jurisdiction at 3. In fact, Petitioners argued that while the decision below declined to give effect to the California judgments, an Ohio trial court in a neighboring county did give the very same judgments effect. *Id.* at 3, 8 (citing *Saret-Cook v. McGrath*, Franklin County Common Pleas Nos. 06-JG-02-2171). Petitioners' briefing to the Ohio Supreme Court also pointed to a decision of another District of the Ohio Court of Appeals as conflicting with the result reached by the Court of Appeals below. *Id.* at 8, citing *Winkler v. Stowe* (Ohio App. Jan. 21, 1997), 4th Dist. No. 95 CA 763, 1997 WL 30947, at *1. In light of what Petitioners themselves have deemed a lack of accord within the Ohio courts, the unpublished decision here cannot be viewed as adding anything to a claimed split of authority.

Finally, any need for review is further diminished given the variety of uniform and federal laws that have been implemented to address family law issues that have sometimes generated interstate dilemmas in the past. The Uniform Interstate Family Support Act ("UIFSA") was implemented in all 50 states in the late 1990's to address the difficulties of interstate enforcement and modification of child support orders. UIFSA was paralleled by federal enactment of the

Full Faith and Credit to Child Support Orders Act, 28 U.S.C. § 1738B, which established national standards under which courts of various states were to determine their jurisdiction to issue child-support orders and the effect to be given by each state to child-support orders issued by the courts of other states. Other uniform and federal laws have been implemented to govern other family law issues which have generated interstate issues. *See, e.g.,* Uniform Child Custody Jurisdiction and Enforcement Act (limiting child custody jurisdiction to one state and providing enforcement provisions for child custody laws); Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A; Uniform Parentage Act (regularizing law for determining parentage).

Adoption of these federal and uniform family law measures in recent decades allows many questions regarding the respect to be given to out-of-state judgments to be resolved as a matter of statute. The UIFSA, for example, contains provisions regarding which of several conflicting support orders is controlling. The ongoing role of uniform and federal acts in resolving interstate difficulties in these areas reduces the need for this Court to do so as a matter of constitutional law.

The application of UIFSA and the Federal Full Faith and Credit to Child Support Orders Act to this case and their relevance to the issues raised has not been addressed in this litigation and was not considered by the Ohio Court of Appeals. Given the important role these federal and uniform Acts play in this

area, this Court should hesitate to accept review in a case where their relevance has not been examined. Moreover, to the extent that nonenforcement of out-of-state orders becomes a significant phenomenon—of which there is no present evidence—the issue may be best addressed through the continued efforts of the states themselves.

CONCLUSION

For the forgoing reasons, Respondent, James McGrath, respectfully requests that this Court deny Petitioners' Petition for a Writ of Certiorari.

Respectfully submitted,

STEBELTON, ARANDA
& SNIDER, LPA, by

GERALD L. STEBELTON
Counsel of Record
DANIEL J. FRUTH
109 North Broad Street,
Suite 200
Lancaster, Ohio 43130
(740) 654-4141

Counsel for Respondent

Not Reported in N.E.2d, 2005 WL 121713

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Fifth District, Fairfield County.

James S. MCGRATH Plaintiff-Appellee

v.

Elizabeth L. SARET, et al. Defendants-Appellants

No. 04 CA 27.

Jan. 13, 2005.

Civil Appeal from the Court of Common Pleas, Domestic Relations Division, Case No. 01 PA 94, Affirmed.

John M. Snider, Stebelton, Aranda & Snider, LPA, Lancaster, Ohio, for Plaintiff-Appellee.

Thomas M. Tyack, Tyack, Blackmore & Liston, Columbus, Ohio, for Defendant-Appellants.

Hon. WILLIAM B. HOFFMAN, P. J., Hon. SHEILA G. FARMER, J. and Hon. JOHN W. WISE, J.

OPINION

WISE, J.

{¶ 1} Appellant Elizabeth Saret appeals the grant of summary judgment in favor of Appellee James S. McGrath in the Fairfield County Court of Common Pleas, Domestic Relations Division. The relevant facts leading to this appeal are as follows.

{¶ 2} On March 29, 2000, Appellant Elizabeth Saret gave birth to twin sons. On June 26, 2000, appellant, together with Appellee James McGrath, executed an acknowledgement of paternity form, naming appellee as the father of the twins.

{¶ 3} On March 6, 2001, the parties agreed to genetic testing to establish the paternity of the twins. Said agreement acknowledged that appellant and the twins would be moving to California. Appellant did not submit herself or the twins for the agreed upon genetic testing.

{¶ 4} On June 25, 2001, appellee filed a complaint in Fairfield County for rescission of the acknowledgement of paternity. On August 27, 2002, the trial court ordered appellant to submit herself to genetic testing within thirty days or an order would be issued stating appellee was not the father of the twins. A nunc pro tunc entry was filed on August 28, 2002 to include the twins for genetic testing.

{¶ 5} Because appellant did not submit herself and the twins for genetic testing per the August 28, 2002 order, appellee filed a motion for summary judgment on October 15, 2002. By judgment entry filed March 12, 2003, the trial court issued an order stating appellee was not the biological father of the twins.

{¶ 6} Appellant thereupon appealed to this Court. We found without merit appellant's claim that Fairfield County lacked jurisdiction, but remanded the matter to provide appellant one more opportunity

to submit to genetic paternity testing. *See McGrath v. Saret* (Dec. 26, 2003), Fairfield App. No. 03CA26 (*"McGrath I"*).

{¶ 7} Following remand, appellant did not avail herself of genetic testing, nor did she appeal our decision to the Ohio Supreme Court. Appellee filed a motion for summary judgment with the trial court on February 5, 2004. Appellant filed a memorandum contra on March 16, 2004. On March 31, 2004, the court issued a judgment entry granting summary judgment in favor of appellee, and recognizing the paternity acknowledgements of June 26, 2000 as being timely rescinded. The court thus ordered that no parent and child relationship exists between appellee and the twins, T.J. and J.S.

{¶ 8} Appellant filed a notice of appeal on April 29, 2004. She herein raises the following sole Assignment of Error:

{¶ 9} "I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN THE WITHIN CASE."

{¶ 10} In her sole Assignment of Error, appellant contends the trial court erred in granting summary judgment in favor of appellee regarding his complaint for rescission of paternity. We disagree.

{¶ 11} Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court.

{¶ 12} *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 36, 506 N.E.2d 212. As such, we must refer to Civ.R. 56 which provides, in pertinent part: "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. * * * " A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor.

{¶ 13} Pursuant to the above rule, a trial court may not enter summary judgment if it appears a material fact is genuinely disputed. The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The moving party may not make a conclusory assertion that the non-moving party has no evidence to prove its case. The moving party must specifically point to some evidence which demonstrates the non-moving party cannot support its claim. If the moving party satisfies this requirement,

the burden shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of material fact for trial. *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429, 674 N.E.2d 1164, citing *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 662 N.E.2d 264.

{¶ 14} Appellant herein essentially re-asserts her position that the service of process by publication on appellee's complaint was insufficient and that California is the proper forum for the parties' dispute. However, this Court's decision of December 26, 2003, states as follows in pertinent part: "From the inception of this case, appellant challenged the trial court's jurisdiction to hear appellee's complaint. * * * Now that we have found jurisdiction, appellant is to carry out the trial court's order of August 28, 2002 and submit herself and the twins for genetic testing within thirty days of this opinion and accompanying judgment entry. If appellant fails to comply, the trial court may reissue its March 12, 2003 judgment entry." *McGrath I* at 6.

{¶ 15} Following remand, appellee filed a motion for summary judgment on February 5, 2004, attaching therewith an affidavit by a LabCorp supervisor, indicating that appellant and the two children had not submitted samples for genetic testing. Appellant does not herein challenge the veracity of the affidavit. Moreover, the doctrine of the law of the case "establishes that the 'decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels.'" *Pipe*

Fitters Union Local No. 392 v. Kokosing Constr. Co., Inc., 81 Ohio St.3d 214, 218, 690 N.E.2d 515, 1998-Ohio-465, quoting *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 3, 462 N.E.2d 410. The doctrine of the law of the case "functions to compel trial courts to follow the mandates of reviewing courts." *Hubbard ex rel. Creed v. Sauline* (1996), 74 Ohio St.3d 402, 404, 659 N.E.2d 781, quoting *Nolan*, supra.

{¶ 16} Accordingly, we find no genuine issue of material fact as to appellant's failure to submit to genetic testing with the twins, and we hold the trial court did not err in granting summary judgment based on the law of the case.

{¶ 17} Appellant's sole Assignment of Error is overruled.

{¶ 18} For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Domestic Relations Division, Fairfield County, Ohio, is affirmed.

HOFFMAN, P. J., and FARMER, J., concur.

JUDGMENT ENTRY

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas, Domestic Relations Division, Fairfield County, Ohio, is affirmed.

Costs to appellant.

PATRICIA PHILLIPS (BAR NO. 41516)
DEANA M. WHITE (BAR NO. 214460)
MORRISON & FOERSTER LLP
555 West Fifth Street, Suite 3500
Los Angeles, California 90013-1024
Telephone: (213) 892-5200
Facsimile: (213) 892-5454

Attorneys for Respondent
JAMES MCGRATH

SUPERIOR COURT OF THE
STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

ELIZABETH SARET-COOK, Petitioner, v. JAMES SCOTT MCGRATH, Respondent.	Case No. BF018828 ~~{PROPOSED}~~ **ORDER AFTER HEARING** (Filed Aug. 20, 2004) Date: June 21, 2004 Time: 8:30 a.m. Dept: 84 Commissioner James D. Endman

Petitioner's Motion to Dismiss this proceeding came on regularly for hearing on June 21, 2004, at 8:30 a.m., in Department 84, the Honorable James D. Endman, Judge *Pro Tem*, presiding. Appearing on behalf of Petitioner and responding party was Lionel P. Levin of Levin & Margolin. Appearing on behalf of

Respondent and moving party was Deana M. White of Morrison & Foerster LLP.

The Court, after considering the pleadings and argument of counsel, ruled as follows:

1. The Judgment Entry of the Ohio Court of Common Pleas entered March 31, 2004 holding that McGrath is not the father of Saret-Cook's twin boys, J. and T.M., must be and is afforded full faith and credit and res judicata effect in these proceedings;

2. The Judgment Entry of the Ohio Court of Common Pleas entered March 31, 2004 holding that the Acknowledgements of Paternity were timely rescinded by McGrath must be afforded full faith and credit and res judicata effect in these proceedings;

3. The Ohio Court of Appeals December 23, 2003 determination that the Ohio courts have full subject matter and personal jurisdiction over the parties and the issue of paternity must be afforded full faith and credit and res judicata effect in these proceedings;

4. The orders for temporary support in this action are terminated as of the filing date of the instant motion, April 21, 2004; and

5. The Court retains jurisdiction solely over the issue of enforcement of its interim orders for support, as all other issues were resolved by the Ohio courts.

Dated: ~~July 27, 2004~~ ~~MORRISON & FOERSTER LLP~~

AUG 20 2004 ~~By: /s/ Deana M. White~~
~~Deana M. White~~
~~Attorneys for Respondent~~
~~JAMES MCGRATH~~

/s/ James Endman
JAMES D. ENDMAN
JUDGE PRO TEM

Supreme Court, U.S.
FILED
OCT 3 - 2008
OFFICE OF THE CLERK

No. 08-91

In The
Supreme Court of the United States

ELIZABETH STAUBER

and

JACK and TIMOTHY McGRATH,
Petitioners,

v.

JAMES McGRATH,
Respondent.

On Petition for Writ of Certiorari to the Fifth District Court of Appeals of Ohio

PETITIONERS' REPLY BRIEF

VORYS, SATER, SEYMOUR AND PEASE LLP, BY

John J. Kulewicz
Counsel of Record
William G. Porter, II
Michael J. Hendershot
52 East Gay Street
P.O. Box 1008
Columbus, OH 43216-1008
(614) 464-5634

Counsel for Petitioners

October 3, 2008

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

REPLY 1

TABLE OF AUTHORITIES

Cases

Apprendi v. New Jersey,
530 U.S. 466, 120 S.Ct. 2348 (2000) 1

United States v. Lopez,
514 U.S. 549, 115 S.Ct. 1624 (1995) 2

Constitutional Provision

Full Faith and Credit Clause 1, 2, 3

REPLY

Respondent discusses everything except the merits of the constitutional question. Instead of addressing the requirements that the Full Faith and Credit Clause imposes upon state courts, Respondent has made an *ad hominem* attack on Ms. Stauber and focused on arguments raised below that the Ohio Court of Appeals did not incorporate into its decision. By attacking Ms. Stauber's past, the response loses sight of the important constitutional principle that the Ohio court disregarded and the interests of the children who will benefit if the California orders are enforceable in Ohio. Indeed, this Petition seeks review not only on behalf of Ms. Stauber, but also on behalf of the children, who are beneficiaries of the California orders and whom DNA testing says with 99.99 percent confidence are the biological children of Respondent. [Pet. App. 7a].

Respondent's obsession with the personal history of one Petitioner should not sideline this Court's review of a longstanding open constitutional question. For example, Respondent's discussion of the *Saret-Cook* case (Resp. Br. at 19-20) has no relevance to the record of the case below. That discussion attacks one Petitioner's character; it does not address the interest of the twins in correcting the Ohio court's mistake, nor does it address the constitutional merit of this Petition. Moreover, significant constitutional issues rarely reach this Court in neat packages. The "watershed change in constitutional law" wrought by *Apprendi v. New Jersey* came to the court from a racially motivated shooting. 530 U.S. 466, 524, 120 S.Ct. 2348 (2000) (O'Connor, J., dissenting); *see id.* at

469 (describing the crime). One of the most significant commerce-clause cases in the last 50 years arrived at the Court because a high school student had been charged with bringing a gun to school. *United States v. Lopez*, 514 U.S. 549, 615, 115 S.Ct. 1624 (1995) (Breyer, J., dissenting) (stating his view that the challenged statute fell "well within the scope of the commerce power as this Court has understood that power over the last half century"); *see id.* at 551 (describing the crime).

The Ohio court, like other state courts in the past, has disregarded the full scope of the Full Faith and Credit Clause by inserting an exception that is inconsistent with the Court's statements about full faith and credit. The Ohio court's error will recur until this Court issues a definitive ruling explaining that the last-in-time rule is embedded in the Full Faith and Credit Clause.

Equally digressive from the constitutional principle at stake in this Petition is Respondent's argument that this Court cannot resolve the paternity issue that this litigation ultimately involves. Petitioners agree, and seek only a review of the Ohio court's erroneous application of the Full Faith and Credit Clause. The consequences of any ruling of this Court correcting the constitutional error are matters for the state court to decide.

Respondent's main legal argument repeats the mistake of the Ohio appellate court—attacking the California judgments collaterally. The opportunity to attack the California judgments passed when Respondent decided not to appeal in California,

because the Full Faith and Credit Clause sharply restricts collateral attacks on other states' judgments. Further, Respondent has not explained how Ms. Stauber's past relationships or her responses to the Ohio court orders somehow inhibited him in resisting or appealing the California support judgments.

Finally, Respondent's observation that most state courts agree with the interpretation of the Ohio appellate court does not diminish the importance of this Court's review. The long history of state court errors regarding full faith and credit will not change until this Court declares that the Clause embodies the last-in-time principle. The question is ripe for this Court's answer.

October 3, 2008

Respectfully Submitted,

Vorys, Sater, Seymour and Pease LLP, by

John J. Kulewicz
Counsel of Record
William G. Porter, II
Michael J. Hendershot
52 East Gay Street
P.O. Box 1008
Columbus, OH 43216-1008
(614) 464-5634

Counsel for Petitioners